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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

REES T. JENKINS,
Plaintiff in Error,

vs.

J. O. BOYD, as Trustee of the Estate of McCollum-Christy Lumber Company (a corporation), Bankrupt,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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SCOPE OF REVIEW.

This case was tried by the court without the intervention of a jury, a jury having been waived by written stipulation under the provisions of R. S. Section 649. The finding of the trial court was general in favor of the plaintiff below and the correctness of the general finding was not challenged nor brought to the attention of the trial court by request, motion, statement or otherwise. There was no request for special findings. Under this state of the record the sufficiency of the evidence to support the general finding cannot be reviewed. Nothing is open to review here other than the rul-

ings of the trial court to which exceptions were reserved during the progress of the trial.

Stanley v. Supervisors of Albany, 121 U. S. 535;

Martinton v. Fairbanks, 112 U. S. 670;

Pennok Oil Co. v. Roxana Petroleum Co., 289 Fed. 416 (C. C. A. 8th Circuit, 1923);

Pabst Brewing Co. v. E. Clemens Horst Co., 264 Fed. 909 (C. C. A. 9th Circuit, 1920);

Oakland Water Front Co. v. Le Roy, 282 Fed. 385 (C. C. A. 9th Circuit, 1922);

Pauchet v. Bujac, 281 Fed. 962, (C. C. A. 8th Circuit, 1922);

Ewert v. Thompson, 281 Fed. 449, (C. C. A. 8th Circuit, 1922);

Blumenfeld v. Mogi & Co., 295 Fed. 123, (C. C. A. 5th Circuit, 1923);

Geiger v. Tramp, 291 Fed. 353, (C. C. A. 8th Circuit, 1923);

Rahilly v. O'Laughlin, 1 Fed. (2d) 1 (C. C. A. 8th Circuit, 1924);

Rajotte-Winters, Inc., v. Whitney Co., 2 Fed. (2d) 801, (C. C. A. 9th Circuit, 1924);

Emerzian v. Kornblum, 3 Fed. (2d) 995, (C. C. A. 9th Circuit, 1925);

Kelly-Springfield Tire Co. v. Bobo, 4 Fed. (2d) 71, (C. C. A. 9th Circuit, 1925).

Martinton v. Fairbanks, 112 U. S. 670, supra: This case was tried before the Judge without a jury, and there was a general finding of facts

and a judgment for the plaintiff below. The court cites Sections 649, 700 and 1011 of the Revised Statutes and says at page 672:

> "Upon the issues of fact raised by the pleadings in this case there was a general finding for the plaintiff. The defendant contends that the evidence submitted to the court did not justify this general finding. But, if the finding depends upon the weighing of conflicting evidence, it was a decision on the facts, the revision of which is forbidden to this court by Sec. 1011. If the question was whether all the evidence was sufficient in law to warrant a finding for the plaintiff, he should have presented that question, by a request for a definite ruling upon that point."

Stanley v. Supervisors of Albany, 121 U. S. 535, supra.

The court speaking through Mr. Justice Field says at page 547:

> "Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different. * * * Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. This limitation upon our revisory power on a writ of error in such cases is by express statutory enactment. (Rev. Stat. Sec. 700.)"

Sierra Land & Live Stock Co. v. Desert Power & M. Co., 229 Fed. 982, (C. C. A. 9th Circuit, 1916), page 984:

"Thus, in *Dunsmuir v. Scott,* 217 Fed. 200, 202, 133 C. C. A. 194, 196, after quoting the language of Mr. Justice Bradley in *Dirst v. Morris,* supra, this court said:

'The question whether or not, at the close of the trial, there is substantial evidence to sustain a finding in favor of one of the parties to the action is a question of law which arises in the progress of the trial. Where the trial is before a jury that question is reviewable on exception to a ruling upon a request for a peremptory instruction for a verdict. Where the trial is before the court, it is reviewable upon a motion which presents that issue of law to the court for its determination at or before the end of the trial. In the case at bar there was no such motion, and no request for a special finding. We are limited, therefore, to a review of the rulings of the court to which exceptions were reserved during the progress of the trial.'

Inasmuch as the finding of the court stands upon the same footing as the verdict of the jury, *the wisdom and justice of this rule is apparent.* But, conceding that the sufficiency of the testimony to support a general finding may be brought before the appellate court for review in this manner, no such motion or application was made to the trial court in the case at bar, and no exception was reserved to the refusal of the court to so rule; and we are therefore limited to a review of such rulings as were excepted to during the progress of the trial. No ruling of that kind has been called to our attention by the assignments of error, and the judgment should be affirmed.

This particular objection was not argued by the defendant in error, and it was stated on the oral argument that the parties had agreed to submit the case on its merits, regardless of the state of the record or of technical ob-

jections thereto. *The objection in question is not a technical one, however.*"

Blumenfeld v. Mogi & Co., 295 Fed. 123, supra, page 124:

> "The case was tried without a jury by stipulation of the parties, and the District Court rendered a judgment for the plaintiff, who made and was requested to make no special findings of law or fact. The defendant objected to the rendition of judgment against him, after the judgment was rendered, but made no motion or request, before the judgment was rendered, either for judgment in his favor or for any ruling of law. In a trial without a jury under R. S. of the United States, Sections 649 and 700, a general finding of the Judge is the equivalent of a verdict of a jury, and is not reviewable on writ of error, even though excepted to by the parties against whom it was rendered.
>
> In order to present for review the question as to whether or not the evidence is sufficient to support the judgment of the court, the complaining party must as a predicate, before the judgment is rendered and during the progress of the trial, move the court for judgment in his favor. If he fails to do so, even though he excepts to the judgment after its rendition, the Appellate Court is without power to review the sufficiency of the evidence, set out in the bill of exceptions, to support the judgment excepted to. *The reason of the rule is that in such a case there is no ruling during the progress of the trial, to be presented for review.*"

Ewert v. Thompson, 281 Fed. 449, supra:

This action was tried by the court, a jury being waived. Page 450:

> "Prior to the filing of these findings the plaintiff had made no request for findings of fact, either general or special, nor for any declaration of law in his favor, nor had he taken any step which, if ruled upon by the trial court and an exception taken thereto, would have permitted this court to review the sufficiency of the evidence to support the findings or judgment. It would require a page of the Federal Reporter on which to cite the cases in the Supreme Court of the United States and in this court in support of the above statement. As this court has said, the cases referred to have been cited and the rule stated with tiresome reiteration."

The exceptions preserved for review by this court are the exceptions to the rulings upon evidence and upon the pleadings. Only five of the assignments of error purport to be of this character. These consist of assignments I to V inclusive as set forth in the assignment of errors. (Tr. p. 166.) The first four assignments refer to rulings upon evidence and are not mentioned in the brief of plaintiff in error, nor included therein under his caption "The Errors Relied Upon." (Brief of plaintiff in error, page 13.) These rulings of the District Judge are all obviously correct and evidently have been abandoned by plaintiff in error.

Assignment V relates to the ruling of the court in allowing plaintiff below to file an amendment to the complaint in order to conform to the proof. No exception was taken to this ruling of the court allowing the amendment. Moreover the allowance of an amendment to the pleadings is entirely dis-

cretionary with the trial court and is not reviewable.

Pauchet v. Bujac, 281 Fed. 962, (C. C. A. 8th Circuit 1922), page 965:

> "During the progress of the trial the plaintiff was permitted to file an amended reply, over the objection and exception of the defendant.
>
> 'The question of the allowance or refusal of amendments to the pleadings is one resting in the discretion of the trial court and is not reviewable in this court.' *Philip Schneider Brewing Co. v. American Ice Mach. Co.,* 77 Fed. 138, 23 C. C. A. 89."

The allowance of the amendment under the facts of this case was a most apporpriate exercise of the court's sound discretion. This assignment also is not argued in the brief of plaintiff in error.

Counsel have confined their argument to assignments numbered VI to XXII, which are directed for the most part to excerpts from the written opinion of the trial judge, rendered in deciding the case.

In *Meyer v. Everett Pulp & Paper Co.,* 193 Fed. 857, this court says, page 863:

> "The general conclusion that the plaintiffs should take nothing except the money deposited is tantamount to a general verdict of a jury, and we are not permitted to look into the evidence for determining whether the conclusion was properly deduced. * * * *Nor can the written opinion of the court be considered as a finding of facts. It shows the conclusion of the judge upon the facts and the law, but cannot be treated as a finding of conclusions of either fact or law.*"

The opinion of the court in an action tried without a jury cannot be taken as constituting a special finding of facts.

Cocoanut Oil Co. v. Pajaro Valley Nat. Bank, 300 Fed. 305 (C. C. A. 9th Circuit, 1924).

In *Northern Idaho & Montana Power Co. v. Jordan Lumber Co.,* 262 Fed. 765, (C. C. A. 9th Circuit, 1920), this court says, at page 766:

> "The plaintiff in error refers to the opinion of the court below as containing special findings of fact, but the opinion cannot be resorted to for that purpose."

To this same effect is:

Highway Trailer Co. v. City of Des Moines, 298 Fed. 71 (C. C. A. 8th Circuit, 1924).

Upon this record no argument has been presented upon the only points concerning which plaintiff in error is entitled to be heard. We respectfully submit that the case must be affirmed upon the state of the record.

STATEMENT OF FACTS.

Upon the merits, plaintiff below (whom we shall hereafter refer to as plaintiff) was clearly entitled to his judgment. His case was fully established by ample testimony, in large part uncontradicted. The statement of facts contained in the brief of plaintiff in error is controverted by us, and we therefore state the facts as they were proven at

the trial and as they are to be found in the transcript of record.

The action was brought by the trustee in bankruptcy of the McCollum-Christy Lumber Co., a bankrupt corporation, to recover certain personal property or the value thereof, which property was converted by defendant below (whom we shall hereafter refer to as defendant.) This property comprised all of the property of the bankrupt lumber corporation and left no assets with which to pay that company's debts, amounting to about $40,000. The corporation was organized in May or June, 1920, and the bankruptcy proceedings against it were commenced September 1, 1922. Defendant was the president of the bankrupt corporation from its organization continuously until its bankruptcy. In April, 1922, he executed a contract for the sale of the company's sawmill with all milling and logging equipment pertaining thereto for the sum of $50,000 to one Soule (Plaintiff's Exhibit 2, Tr. p. 55), and in June, 1922, he executed a bill of sale in his individual name and received $50,000 as the purchase price therefor, which sum he retained to his own use. (Plaintiff's Exhibit 3, Tr. p. 57.) He thereupon delivered all of the property without reservation unto Soule. (Tr. pp. 100, 103.)

The defense upon which defendant relies to excuse this extraordinary conduct is first—he claims the property had become affixed to his land and secondly he claims that plaintiff's right of action was barred by a certain judgment of the Superior

Court of the State of California for Plumas County which rendered the matter in controversy res adjudicata. We shall presently discuss these defenses.

Defendant owned a certain tract of land in Plumas County, California, upon which was growing a stand of timber estimated at approximately sixty million feet. On June, 1920, he entered into a contract with the McCollum-Christy Lumber Company for the sale of the timber for the sum of $150,000, payable in installments. (Plaintiff's Exhibit 6, Tr. p. 76.)

The agreement provided that the first payment of $25,000 was to be made July 1, 1920, and that $10,000 thereof was to be paid in cash and the remaining $15,000 in shares of the capital stock of the McCollum-Christy Lumber Company at par. By the terms of the contract the corporation was given the right to enter upon the lands *after it had made the first payment* and then to erect mills and apparatus; given the right of ingress and egress and to conduct milling, merchandising and logging operations. Ten years were granted within which to cut and remove the timber.

The first payment was made within the time and in the manner provided by the contract. The corporation thereupon entered and installed a fully equipped sawmill plant and camp for the felling, manufacturing and marketing of lumber and feeding and housing one hundred men. The mill cost about $86,000. (Tr. p. 112.) The operations

did not prove profitable and the McCollum-Christy Lumber Company ran into debt and finally shut down the mill. Defendant then secretly entered into negotiations for the sale of the mill and all of its equipment of every nature to Soule. He agreed to pay Christy, who was vice-president of the company, a fee of $5000 for effecting this deal. Christy agreed with Whitlock, who was secretary of the company, to divide the commission.

Jenkins testifies (Tr. p. 92): "Yes, I hired Christy, who was vice-president of the company, to find a buyer. That's true * * * I knew that Christy was a member of the Board of Directors and that his name was in the title of this company."

Whitlock testifies to his understanding with Christy—"if I would furnish the funds for him he would split the commission with me that he was to get. I was to get $2500 and he $2500." (Tr. p. 154.)

The sale was consummated. Jenkins, the president, kept the proceeds. He paid $4000 to Christy and Whitlock, the worthy vice-president and secretary of the corporation, and the company thus denuded of its assets by its own officers, was thrown into bankruptcy by the creditors.

RES ADJUDICATA.

The judgment roll of the Quincy suit is in evidence. (Plaintiff's Exhibit 4, Tr. pp. 59-74.) The complaint recites that Jenkins, the defendant here and the plaintiff in said action, was the owner of land upon which standing timber was growing; that he entered into a contract with Seehorn, who assigned to McCollum-Christy Lumber Company, giving the right to enter and cut and to erect a mill; that certain payments were in default and praying for a termination of the contract and for an order decreeing the sawmill, engine and boiler to be the property of the plaintiff. Service was made upon Seehorn, as managing agent of the corporation defendant. The president of the corporation defendant, who was also the plaintiff in said suit, made no move to enable a bona fide defense to be interposed. His action faced the opposite direction. He told Seehorn that notwithstanding the suit, Seehorn could continue the operation of the mill under the same terms and pay off the creditors (Tr. p. 106), and Seehorn believed him. "I was to run the mill and pull out the creditors and make something for the stockholders if I could. * * * That was the reason I did not put up any defense." (Tr. p. 107.) "I was to run the mill and pay the creditors. I never was told I could not until after it was sold." (Tr. p. 109.) The action went to trial on a default of the defendants on May 6, 1922. Prior to that time Jenkins had already arranged

for a sale of all the property to Soule. (Plaintiff's Exhibit 2, p. 55.) Seehorn was not told of the sale until judgment had already been entered. (Tr. p. 109.) Seehorn testifies (Tr. p. 109) that Jenkins said at the Quincy trial that $10,000 had been paid him and the $15,000 shares of stock were not mentioned. The Quincy court so found. (Tr. p. 70.) As we have stated above, this first payment had, in fact, been made according to the terms of the contract. The contract called for forfeiture upon failure to make the first payment.

The Plumas County decree is germain to the issues of the present case only in so far as it purports to find that the mill building, boiler and engine had become fixtures. Beyond that finding of annexation of these three specified objects, the Quincy decree is wholly irrelevant here. The State court found that the sawmill, engine and boiler are permanently resting upon the land and had become fixtures.

The judgment of the Plumas County court determined nothing. A corporation was defendant. Its president was plaintiff. The president-plaintiff, by deceiving one of his fellow officers and by subsidizing the other two, procured a default to be suffered by failure of the corporation to interpose a defense. At the trial the court was led to find a forfeiture for failure to make the first payment called for by the contract, which payment the corporation had in fact made. The doctrine of res

adjudicata cannot be invoked to sustain a fraud of this nature.

O'Connor v. Irvine, 74 Cal. 435, *441.*

Page 441:

"The judgment in the ejectment suit of Fair v. Irvine is relied upon by defendant to defeat the claim of plaintiff in this action. Courts will not entertain fictitious actions when their true characters are made to appear; *and a judgment rendered in such a case when its true character is shown determines nothing.*"

Spencer v. Vigneaux, 20 Cal. 442.

Page 448:

"This is an action to recover a balance alleged to be due on a judgment rendered by the late Superior Court of the City of San Francisco. *Two of the defendants answer, charging fraud in the procurement of the judgment, and claiming that there is nothing legally or properly due thereon. The alleged fraud consists in the concealment of a credit of $10,000, to which the defendants were entitled on the indebtedness upon which the judgment was obtained.* The facts in regard to this credit are clearly made out, and it is evident that a conspiracy existed between the plaintiff and the defendant Vigneaux to defraud the other defendants of the amount."

Page 449:

"The authorities cited by the counsel for the appellant on the question as to whether the defense set up is not to be regarded as res judicata, have no application. The principle enunciated is undoubtedly correct, but there was no actual adjudication upon the matter in contro-

versy, *and this principle cannot be invoked to sustain a fraud.*"

Carpentier v. The City of Oakland, 30 Cal. 439.

Page 443:

"If, then, there were any reasons, founded upon either law or equity, why the plaintiff ought not have the benefit of the judgment in suit, the defendant was at liberty to urge them in this action. This is not only consistent with our code of procedure, but is consistent with the better reason."

There is another reason why the trustee in bankruptcy of the McCollum-Christy Lumber Company is not bound by anything contained in the Plumas County judgment. A trustee in bankruptcy occupies a dual position. He is vested by operation of law with title to all the property of the bankrupt debtor and he is the representative of all of the creditors. He is clothed by the statute with all the rights of an execution creditor with execution returned unsatisfied. (Bankruptcy Act, Section 47a.)

Pacific State Bank v. Coats, 205 Fed. 618, *622* (C. C. A. 9th Circuit, 1913);

In re Seward Dredging Co., 242 Fed. 225, *227* (C. C. A. 2nd Circuit, 1917);

In re Franklin Lumber Co., 187 Fed. 281 (District Court, 1911).

Plaintiff appears in this action therefore not only as standing in the shoes of the bankrupt, defendant in the Plumas County suit, but also in a dif-

ferent capacity, as representing persons who were not parties to that action.

Travis Glass Co. v. Ibbetson, 186 Cal. 724;
Stefan v. Raabe, 1 (2nd) Fed. 129 (C. C. A. 8th Circuit).

Moreover, defendant Jenkins holds the proceeds of his fraudulent dealings with the corporation as an involuntary trustee. This furnishes another reason why the judgment of the Plumas County court is of no effect in this case.

15 *Ruling Case Law,* 857;
Kimball v. Tripp, 136 Cal. 631;
South San Bernardino Land Co. v. San Bernardino National Bank, 127 Cal. 245.

Moreover, we interpret the following statement from the brief of counsel for plaintiff in error as a complete withdrawal and abandonment of the defense of *res adjudicata.*

On page 52 of the brief, counsel states:

> "Above and beyond the foregoing, it makes no difference in this case whether the Plumas County judgment was valid or invalid. It did not give Jenkins a right that he did not have before, and it did not take away from him any right that he did have before. It was simply a precautionary measure."

THE DEFENSE OF FIXTURES.

Only a small portion of the property converted by defendant is at all involved in the question of fixtures. The greater part of the property was quite free and unattached to the land. (See testi-

mony of Turpin, Tr. pp. 98, 99; of Seehorn, p. 117.) There is ample evidence that the value of the converted property, exclusive of the building, engine and boiler exceeded $50,000.00, the amount of the judgment. (Seehorn, Tr. pp. 112, 113; Loosley, Tr. p. 121; Neese, Tr. pp. 122 to 132.)

Furthermore, the question whether specific articles have or have not been so affixed to the land as to become part of the realty is a question of fact to be determined from all the circumstances, and the finding of the trial court will not be reviewed.

Miller v. Waddingham, 91 Cal. 377, 379;
Gosliner v. Briones, 187 Cal. 557, *560.*

In *Gosliner v. Briones,* supra, the court says, page 560:

> "In the present case the trial court found that the buildings were not imbedded in the soil, but were constructed on mud sills placed upon the surface of the ground and that the plaintiff had no intention of permitting the buildings to remain on the land, but placed them there pursuant to an understanding that they should be removed therefrom. *From these circumstances surrounding the erection of the buildings the trial court concluded that plaintiff never intended that his buildings should permanently rest upon the defendant's land, and this determination cannot be disturbed.*"

NONE OF THE PROPERTY HAD BECOME FIXTURES.

Many circumstances may be considered in determining whether personal property has become

so affixed to the soil as to change its character and to become a fixture or a part of the land. Method of annexation is a circumstance, but as Mr. Justice Holmes says in *Detroit Steel Cooperage Company v. Sistersville Brewing Co.,* 233 U. S. 712, *717,* there should not be given "a mystic importance to bolts and screws." The controlling circumstance is the intention of the parties.

Gosliner v. Briones, 187 Cal. 557.

Where the articles are annexed or constructed by a licensee upon the land of another, the presumption is well nigh conclusive that the right to remove is reserved. In the contract in question, Jenkins expressly grants the right to enter and install the equipment. No express provision in the contract withdraws or limits the implied right to remove. In such a case there can be no question of annexation.

> "An agreement that the article annexed shall retain the character of personalty, and be removable as such, is ordinarily implied from the fact that the article or structure was annexed or erected by the license or permission of the landowner."
>
> 26 C. J. 679.
>
> "Revocation of the license under which the article was annexed to the land does not in itself deprive the licensee of the right of removal, he being entitled to a reasonable time in which to remove the article."
>
> 26 C. J. 680.

In *Watterson v. Cruse,* 179 Cal. 379, the court says, at page 382:

"While things affixed to the soil ordinarily belong to the owner of the soil, there may be a right of removal arising from agreement of the parties or their relation (Civil Code, Secs. 1013, 1019.) *Thus, he who has affixed improvements to land under a license from the owner is generally held to have a right to remove them within a reasonable time after the termination of the license.* (Bronson on Fixtures, Sec. 106; 19 Cyc. 1056.) An agreement for such right of removal is implied from the circumstances."

In *Wiggins Ferry Co. v. O. & M. Railway,* 142 U. S. 396, the court says at page 415:

"As between landlord and tenant, *or one in temporary possession of lands under any agreement whatever for the use of the same, the law is extremely indulgent to the latter with respect to the fixtures annexed for a purpose connected with such temporary possession.*"

and at page 416, the court says:

"In Van Ness v. Pacard, 2 Pet. 137, it was held that a house built by a tenant upon land, primarily for the purpose of a dairy, and incidentally for a dwelling house for the family, did not pass with the land. The earlier authorities are reviewed in that case by Mr. Justice Story, and the conclusion reached, that whatever is affixed to the land by the lessee for the purpose of trade, whether it be made of brick or wood, is removable at the end of the term. *Indeed, it is difficult to conceive that any fixture, however solid, permanent and closely attached to the realty, placed there for the mere purposes of trade, may not be removed at the end of the term.*"

In *Gosliner v. Briones,* 187 Cal. 557, the court says, at page 561:

> "Whatever the rights of a trespasser or entire stranger may be, *the rule is that where structures are erected upon land by a person who occupies the land with the permission or license of the owner but who has no estate in the land, that is to say, by a mere licensee, consent on the part of the owner of the land that the structures shall remain the property of the person erecting them will be implied in the absence of any other facts or circumstances tending to show a different intention. (Merchants' Nat. Bank v. Stanton,* 55 Minn. 211; *Joplin Supply Co. v. West,* 149 Mo. App. 78; *Fischer v. Johnson,* 106 Iowa 181.)"

Gosliner v. Briones, supra, announces the well established law of fixtures in California. It is there held that a five-room dwelling-house and a large windmill, both of which were built upon heavy redwood mudsills placed upon the surface of the ground, were not fixtures, but remained the property of the person constructing them.

The burden of proof is on the party who asserts that a thing once a chattel and ordinarily such has become merged into the realty by being annexed thereto.

5 *Enc. of Evidence,* 757;

Hayford v. Wentworth, 54 Atlantic 940 (Maine 1903);

Bank of Opelika v. Kizer, 24 So. 11 (Ala. 1898);

Hill v. Wentworth, 28 Vt. 428;

Delacy v. Tillman, 3 So. 294 (Ala. 1887).

In *Bank of Opelika v. Kizer,* supra, the court says:

> "There was also personal property claimed by the corporation, consisting of machinery for which it has paid from six to eight thousand dollars, placed in position, and used in the factory at the time of the transfers drawn in question of the value of about four thousand dollars. Whether this machinery had been annexed to the realty and by the annexation a permanent accession to the freehold was intended, is not shown by the evidence. Courts cannot know otherwise than through the medium of evidence, the particular facts necessary to convert this character of property primarily personal into fixtures, or parts of the realty in connection with which it may be used. The burden of proving such facts, if from them they could derive benefit, rested on the complainants. As the case is now presented by the evidence, the machinery must be deemed personal property of the corporation in determining the character of the transfers."

In *Hill v. Wentworth,* supra, the question before the court concerned itself with whether certain machinery and equipment of a paper mill were covered by a mortgage of the land. The court says at page 437:

> *"To change the nature and legal qualities of a chattel into a fixture requires a positive act on the part of the person making the annexation, and his intention so to do should positively appear, and if this be left in doubt the article should be held to be personal property."*

Defendant failed to sustain this burden of proof.

The California courts have gone to the greatest lengths in permitting the removal of property as

trade fixtures by the person erecting the same upon lands of another.

Roberts v. Mills, 56 Cal. App. 556, where a frame building resting on mudsills was held to be a trade fixture as between landlord and tenant.

Hendy v. Dinkerhoff, 57 Cal. 3, where an engine and boiler were held personal property, although attached to a mill.

Midland Oil Fields Company v. Rudneck, 188 Cal., 265, where the court says, page 267:

> "The main controversy arises upon the question whether the boilers and derrick were fixtures and as such a part of the realty at the time one Enwright, from whom the defendants bought the property, made his entry upon the land as a homesteader under the laws for the disposal of public lands of the United tSates, or was personal property."

Page 268:

> "The derrick was eighty-four feet high on a twenty-foot framed base of heavy timbers set on the surface of the ground. *The boilers were set on the ground and a part thereof, known as the fire-box, was incased with brick to conserve the heat."*

Held to be personal property.

Placer County v. Lake Tahoe Ry. & Transportation Co., 58 Cal. App. 764.

The court says at page 782:

> "* * * where a railway company lays its tracks and erects buildings for the proper conduct of its transportation business over and across land under a claim of right, such property

cannot be held to become a part of the realty, but will at all times retain the character of personality."

Best Manufacturing Company v. Cohn, 3 Cal. App. 657. (Petition for rehearing denied by the Supreme Court, 1906.)

As between the vendor under a conditional contract of sale and the lessor of the vendee—held that the following property is personal property and not a portion of the realty: One forty horse-power crude-oil engine, together with the fixtures thereof, consisting of one sparking dynamo, battery, pulley, shafting and boxes attached in the following manner. A solid foundation of concrete or cement was constructed mostly below the surface of the ground. Upon this concrete foundation the said crude-oil engine was placed and securely and solidly bolted thereto and the whole enclosed within a certain portion of a wooden building erected by the said Prosperity Mining Company on the land of defendant.

Woods v. Bank of Haywards, 10 Cal. App. 93.

A bank's steel vault together with its brick casing held to be a trade fixture and removable as such.

Hogan Lumber Company v. City of Oakland, 25 Cal. App. 130.

A wharf was built on piles driven into the ground on the land side of a quay wall along the water front of the City of Oakland to be used temporarily only, in the construction of the quay. The contractor becoming bankrupt, held that the trustee in bankruptcy could sell this wharf as personal property.

See also:

New Chester Water Co. v. Holly Manuf'g. Co., 53 Fed. 19 (C. C. A. Third Circuit 1892);

Bergh v. Herring-Hall-Marvin Safe Co., 136 Fed. 368 (C. C. A. Second Circuit, 1905).

In *Woodland v. Glenwood Lumber Co.,* 171 Cal. 513, upon termination of a stumpage contract the court allowed the removal of the mill within ninety days from the decree. (Page 525.)

When the contract between defendant Jenkins and the McCollum-Christy Lumber Company was entered into, defendant owned the land and standing timber and nothing more. None of the property here in question was upon the land. Jenkins agreed to sell the timber granting to the buyer the right to enter, cut, manufacture and remove. The buyer entered, brought in and installed the apparatus for cutting, manufacturing and removing the timber. A large part of this property was free and never became affixed to the land. Part of it consisted of machinery which was installed for operation. All of the property constituted trade fixtures, being the necessary equipment for harvesting the crop of timber. If the buyer had performed its contract, it could have removed its apparatus within a reasonable time. Upon default it did not lose the ownership of this property. The relationship of the parties does not give rise to such a result and the contract does not call for it. *The contract nowhere*

provides for a forfeiture or surrender of the right to remove this property.

A sawmill is distinctly a trade fixture. The very nature of the manufacturing process differentiates a sawmill from a residence or other building, as to which there is no ordinary intention of use in a different location. Sawmills and their equipment are movable. They are designed and built for that purpose so as to be moved from place to place as the logging operations progress. Four moves were contemplated in cutting this stand of timber. (Tr. pp. 159, 110.) The process is quite like a harvesting operation.

Seehorn, who was general manager of the mill, testifies as to how the parties understood the contract. (Tr. p. 111):

> "Jenkins never told me he was going to forfeit the mill and keep the mill. He never claimed the mill. * * * We always claimed that the mill, the machinery and everything that was movable there, and was not in the ground, belonged to the company or the creditors."

And the same witness testifies, page 159:

> "We would have to move the mill four times in order to cut this timber, in order to make cheap logging. We had a right to move the mill. He would not have any objections to that."

That the purchaser of a stand of timber should forfeit his mill, camp and equipment costing $85,000, merely by entering and installing the same upon the land of the seller, under license so to do, is a propo-

sition which finds support neither on principle nor on authority.

We proceed to answer in detail certain special points contained in the brief of plaintiff in error.

TIMBER CUT WAS PAID FOR.

On page 6 of the brief counsel state that the building, lumber and logs which defendant was charged with converting were constructed out of lumber manufactured from his timber and for *which he had never been paid.* The testimony shows that only three million feet were cut; that the contract price was originally $2.50 a thousand, subsequently modified to $4.00 a thousand, which at the maximum price would be $12,000 for all lumber cut, and that Jenkins had been paid in fact $25,000. (Tr. pp. 110-111-116-54.)

CORPORATION DID NOT ABANDON.

Counsel for plaintiff in error quote the testimony of Earl Whitlock (Brief, p. 8) that this witness sent a telegram to the defendant advising defendant to take his own course best to protect himself, and that this message was sent by the witness in his capacity as secretary and upon authorization of the board of directors. Counsel here supply to this testimony the caption "Corporation Abandoned." On page 40 of the same brief, this telegram and the testimony of its author, Whitlock, that he sent the

telegram in his official capacity and upon authorization of the board of directors is again set forth in full,—this time under the caption "Board of Directors Abandoned Contract." On page 46 of the same brief, counsel more expressly sponsor the testimony of Whitlock. "Defendant's Exhibit 12 * * * is a telegram from Earl Whitlock, Secretary of the corporation, *sent at the instance of the directors* to Jenkins asking him to take his own course to protect himself." (Brief p. 46; top of page.) Finally on page 47 of their brief, counsel step squarely into the roll of author and assume direct responsibility for the statement that the *"Board of Directors after a meeting held wired him (Jenkins) to proceed to protect his individual interests."* The Honorable Judges considering this case must look quite outside of the brief submitted by plaintiff in error to find any suggestion of the fact that this testimony of Whitlock was at the trial totally discredited, impeached and repudiated. It was discredited by a showing that Whitlock was bribed to sell out the stockholders; it was impeached by a showing that Whitlock had previously testified in the Bankruptcy Court that he had sent this telegram as an individual and not as secretary of the company; and it is repudiated by the witness's own admission. The transcript at page 152 shows:

> "My testimony was taken in Marysville on the 30th day of March, 1923. I answered at that time as to this wire. I said I wired that as an individual and not as secretary of the company. I suppose I did if it is on the record."

CASES CITED ON CONSTRUCTION OF CONTRACT.

On page 23 of their brief, counsel cite cases to the point that *"such a contract"* has been held to be that of vendor and vendee and not that of landlord and tenant. The cases cited are:

Pomeroy v. Bell, 118 Cal. 635, which related to a contract for the purchase of land;

White v. Bank of Hanford, 148 Cal. 552, which was a contract for the sale of land;

Briles v. Paulson, 170 Cal. 196, and *Briles v. Paulson,* 170 Cal. 408, which relate to a contract for the purchase of land;

Compton Land Co. v. Vaugn, 33 Cal. App. 130, which relates to an option for the purchase of land.

In none of these cases did the matter concern itself with timber contracts, and the cases are not in point.

CONTRACT NOWHERE PROHIBITS REMOVAL.

Under the heading "Contracts Expressly Provided Against Removal" (Brief, p. 25), counsel state:

> "(B) The contract specifically provides that at the termination of this contract, for any cause, *the property* shall be returned to the vendor in as good state and condition as the same was at the time of entering into the contract or might thereafter be put into."

This is a misquotation and there is no word in the contract against removal of the mill, machinery or equipment.

What the agreement does provide is this: After a provision limiting the use of the lands to purposes of logging, milling and marketing the lumber and prohibiting grazing and enjoining the keeping of the gates closed, the agreement provides that the second party at the expiration of the contract or prior termination thereof will surrender *"the said lands and the whole thereof* in as good order and condition, reasonable use thereof and damage by the elements excepted, as the same now are or may be hereafter put into." (Tr. p. 82.) The provision of the earlier contract is identical. (Tr. p. 53.)

Counsel edit this text so as to read that the second party upon termination

> " 'for any cause shall and will surrender *the property* to defendant in as good order and condition reasonable use thereof and damage by the elements excepted as the same now are or may be hereafter put into.' "

This paraphrase brings the wording of the contract into significant conformity to the language found in the cases from which counsel quote at page 26 of their brief:

> *West Coast Lumber Company v. Apfield,* 86 Cal. 335; and
>
> *Board of Education v. Grant,* 118 Cal. 39.

In each of these two cases moreover, "the fixtures" in question consist of a four-story building upon a city lot.

The Jenkins agreement provides for a surrender of *the said lands* in good condition.

The witness Seehorn testifies (Tr. p. 158):

> "By carriage I mean the carriage that carries the logs to and from the saw; that runs by steam. It runs on a track. All you would have to do to remove the carriage and such things would be to take the wood screws out and move the machinery. The screws were screwed into the floor, sometimes it was on a board on top of the floor. Overhead there were braces for the purpose of holding the shafting. By releasing these screws and these bolts you could remove the machinery entirely out of the building without any injury to the building. The cabins were removable. They were set on posts so that you could put skids under them and move them. I think we moved some of them a short distance. *There was not anything to damage the land if we moved this machinery and this mill site.*"

TIME OF THE ESSENCE.

The provision of the contract that time is of the essence is quite immaterial as an excuse for defendant's conversion. Such a provision might relieve Jenkins of his obligation to sell, but it should not be held to be equivalent to a provision declaring a forfeiture. The only provision of the contract calling for a forfeiture relates to a failure of the corporation to make the first payment, which payment as we have seen, was made in time. Counsel cite:

Grey v. Tubbs, 43 Cal. 364;
Cleary v. Folger, 84 Cal. 316;
Woodruff v. Semi-Tropic Land & Water Co., 87 Cal. 275 (Brief page 28).

Grey v. Tubbs, supra, was an action for the specific performance of a contract for the sale of land and the court held that the vendee, being in default without excuse, was not entitled to specific performance against the vendor. No question of forfeiture is involved.

Cleary v. Folger, supra, was an action to recover $900 as money received by defendant for the use of plaintiff, being the first payment on a contract for the purchase of land. The contract provided for the payment of $900 "as forfeiture," and the court says at page 321:

> "Forfeitures, as such, are not favored by the courts, and are never enforced if they are couched in ambiguous terms. * * *
>
> Now, as both parties have failed to comply with their part of the agreement, and, as we have seen, time being of the essence of the contract, the contract is at an end, the nine hundred dollars remain in the hands of the defendant as money had and received from the plaintiff, subject to be recovered by the plaintiff less the amount of damages which the defendant may show for the failure of the plaintiff to complete the purchase."

In *Woodruff v. The Semi-Tropic Land and Water Company,* supra, the plaintiff was vendee under an installment contract for the purchase of land and the vendor failed to execute the conveyance provided in the contract after a demand therefor. The court held the vendee entitled to recover back the installments of purchase money paid. None of these cases are in point.

The provision that time is of the essence was moreover waived by the conduct of the parties after the default of the lumber company. There had been two former changes in the contract prior to the suit at Quincy and Jenkins told Seehorn to the very end that Seehorn would be permitted to operate the mill until the creditors were paid. (Tr. p. 107.) Jenkins told Seehorn in the presence of Riley, who was a director, stockholder and creditor, that Seehorn could go ahead and operate the mill under the same terms. (Testimony 106.) Uninterrupted operation had been permitted after failure to make the payments at the time provided in the contract. The provision being waived the buyer could not again be put in default without notice and tender of the timber deed.

Kerr v. Reed, 187 Cal. 409, *414;*

Lemle v. Barry, 181 Cal. 6, *10;*

Boone v. Templeman & Mayer, 158 Cal. 290, *297;*

Sausalito etc. Co. v. Sausalito Improvement Co., 166 Cal. 302, *308.*

FRAUD.

Counsel devote several pages of their brief to the proposition that an officer of a corporation may deal with the corporation the same as an outsider. We do not question this proposition "but always sub-

ject to severe scrutiny and under the obligation of acting in the utmost good faith."

On page 33 of their brief, counsel state:

> "(A) There is no law prohibiting the president of a corporation from contracting with the corporation if his actions are free from fraud. *No fraud was alleged nor proven in this case.*"

The complaint alleges (Tr. pp. 34-35):

> "That said judgment and decree was fraudulently obtained in this.
>
> (1) That the defendant herein cause the summons in said action to be served on one W. E. Seehorn, the treasurer and managing agent of said McCollum-Christy Lumber Company, a corporation; that at or about the time said summons was served on said Seehorn, the defendant herein represented to said Seehorn that if he, the said Seehorn, would permit judgment to be entered against the company, the defendant herein would see to it that said Seehorn would be permitted to operate the properties of said company until such time as all of the creditors of said company could be paid off in full; *that said representations so made to said Seehorn by the defendant herein were false and fraudulent at the time they were made. and were made without intention of the part of the defendant herein to fulfill the same;* and said Seehorn, relying upon said false and fraudulent representations, permitted the default of said corporation defendant to be entered in said action and permitted judgment in said action to go against said corporation defendant without any defense being made thereto by said corporation defendant.
>
> (2) That the only other person connected with the McCollum-Christy Lumber Company, a corporation, who was informed of the pen-

dency of said action so brought by the defendant herein against said McCollum-Christy Lumber Company, a corporation, was one Geo. F. Christy, the vice-president of said McCollum-Christy Lumber Company, a corporation; *that the said Christy was induced by the defendant herein to permit a default to be entered in said suit against said defendant corporation and no defense to be interposed on behalf of said defendant corporation through fraud, connivance and collusion between said defendant herein and said Christy, in that said Christy was, prior to the entry of said judgment and decree and while he was such vice-president, employed for a monetary compensation by the defendant herein to secure a purchaser for the property herein concerned which said prospective purchaser was to purchase said property from the defendant herein as said defendant's individual property* and that said Christy did prior to the entry of said judgment and decree procure a purchaser for said property which said purchaser was to purchase the same for the defendant herein and that the defendant did prior to the entry of said judgment and decree give said purchaser so procured as aforesaid an option to purchase said property as if the same was then and there his individual property; that the compensation of said Christy was dependent upon the consummation of the sale of said property by the defendant herein to the purchaser so procured by him as aforesaid."

The testimony amply supports these allegations and reveals the further fraud upon the Quincy Court practiced by defendant in suppressing mention of the receipt of the $15,000 payment in stock of the corporation, part of the first payment made according to the terms of the contract.

The fraud practiced in this case, as thus pleaded and proved is extrinsic fraud as defined in the leading cases of

Pico v. Cohn, 91 Cal. 129, *133,* and
U. S. v. Throckmorton, 98 U. S. 65 and *66.*

See:

Bacon v. Bacon, 150 Cal. 477, *491;*
Flood v. Templeton, 152 Cal. 148, *156;*
Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, *209.*

In *Campbell-Kawannanakoa v. Campbell,* supra, the court says, page 210, where a party was in a former proceeding deprived by some fraudulent artifice or breach of fiduciary duty of his opportunity to be heard upon the issues there presented and determined, we have "the most common instance of what is held to be extrinsic fraud."

We are within the rule of extrinsic fraud for two reasons; first, the corporation was kept by fraud from presenting its defense and secondly the creditors of the company were not there before the court, and their rights are presented here by the plaintiff who sues in their behalf.

MERITORIUS DEFENSE TO QUINCY SUIT.

Counsel state (Brief p. 51), that it is essential that a meritorious defense to the Plumas County action be pleaded and proved, "neither of which

were done in this action." The complaint (Tr. p. 36), states:

> "(3) That said corporation defendant had at all times herein mentioned and it now has a good and sufficient defense to said action on its merits; in this that said defendant never at any time or at all owned said mill property or any part thereof nor did he at any time have the right to forfeit the title of same or any part thereof to himself and said bankrupt corporation at all times owned, and now owns said property and the whole thereof."

Ample testimony was introduced to establish these allegations.

JENKINS WAS PRESIDENT.

Counsel quote from the record to support their caption "Jenkins not active president—took no part in corporation." The record supplies evidence in substantial conflict with that quoted. See testimony of Turpin (Tr. pp. 99, 100):

> "Mr. Jenkins was familiar with everything. He was at some meetings at least three. * * * Jenkins came up to the mill quite often. He got a statement, he examined everything, he was shown everything, he always looked at the books * * * Statements were there, they were shown to him by the bookkeeper." (Testimony of Seehorn, Tr. p. 105.)

Loosely, a creditor, testified that it was generally understood by all the business people around Beckwith and Portola that Mr. Jenkins was president and that the indebtedness was incurred on the strength of that belief. (Tr. p. 120.) Jenkins him-

self testifies (Tr. p. 86) that when the company was organized he was asked to become president to establish the credit of the corporation and that he agreed that "if it does any good to use my name it is all right with me," and that with this understanding he became president. In view of the testimony of Seehorn quoted above, it is not easy to justify the language of counsel on page 41 of their brief.

> "There is no word of testimony in this record showing that Jenkins ever knew anything of the business affairs of the corporation or that he ever knew it was insolvent."

The witness, Seehorn, testifies further on page 106:

> "Mr. Jenkins had furnished to him a list of creditors and the amounts due. *He knew all about that.*"

JENKINS TOOK EVERYTHING.

Finally counsel assert (Brief p. 58) that Jenkins only sold to Soule the mill and such property as was his. Note the bill of sale to Soule. It conveys:

> "1 certain sawmill, engine and boiler heretofore known and described as the McCollum-Christy Lumber Company mill in Grizzly Valley in said County and State, together with:
> All personal property, appliances and kitchen furniture in the bunk houses on said premises now owned by the said Rees T. Jenkins." (Plaintiff's Exhibit 3, Tr. p. 57.)

Apparently nothing could be plainer. A casual or even a careful reading is calculated to convey the impression that the instrument primarily intends

two things, first to pass everything and secondly to warrant or at least to represent that all the personal property is owned by Jenkins. Now we are enlightened that the words "now owned by Rees T. Jenkins" were inserted to defeat both of these constructions and to transform the instrument into a quasi-quitclaim or a "take-at-your-risk" transfer of whatever the grantor may be proved to have owned.

To claim the instrument was received in this light by Soule is preposterous. First because it is given in fulfillment of the earlier option (Plaintiff's Exhibit 2, Tr. p. 55), which describes the subject matter as "that certain sawmill * * * *with all milling and logging equipment pertaining thereto.*" Secondly because Soule paid $50,000 for the property and the value of the mill, engine and boiler was $10,000, (Tr. p. 112) and thirdly because Soule got everything.

Turpin, the watchman in charge of the mill, turned over to Stephenson, the agent of Soule, on the order of Jenkins, everything that was there. This witness testifies (Tr. p. 100):

> "I didn't reserve any property at all at the time I surrendered those premises to Mr. Stephenson. I was not told by Jenkins to reserve any property. I was not told that the company had any property there that was not supposed to go."

Moreover, Mr. Richardson, who was the attorney for Soule, testified that when he inquired of Jenkins

whether Soule would be hurt by the pending litigation, Jenkins admitted that the bill of sale passed everything under warranty, for what other meaning can we attach to the assurance of Jenkins to Richardson not to worry; that he, Jenkins, was good for it.

Mr. Richardson testifies (Tr. p. 103):

> "So far as I know Soule claimed all the property in connection with that mill—real, personal and mixed. It was in use in 1923. Jenkins said he was good for it as far as Mr. Soule was concerned, and Mr. Soule need not worry if any question came up as to whether he had a right to sell it."

In conclusion we respectfully submit:

1. As this case was presented, tried and decided before the District Court, no right to review has been saved upon any of the points argued by the plaintiff in error.

2. There is no provision in the contract which purports to expressly forfeit the company's right to remove this sawmill, camp, machinery and equipment and there is nothing in the circumstances of the case to create an implied provision to such effect.

3. By his failure to take any steps toward saving the assets of the company for its stockholders and creditors; by deceiving and subsidizing his fellow-officers for his own personal profit; and by converting to his own use all of the company's assets and the proceeds of the sale thereof,—defendant has been guilty of flagrant fraud and of the grossest

betrayal of the trust imposed upon him as president of the corporation.

Dated, San Francisco,
June 3, 1925.

Respectfully submitted,
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